

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION**

In re:

DAVID A. COMOLETTI and  
SUSAN K. COMOLETTI,

Case No. 6:09-bk-01824-ABB  
Chapter 7

Debtors.

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**ORDER**

This matter came before the Court on the Emergency Second Motion for Sanctions (Doc. No. 39) (“Motion”) filed by the Debtors David A. Comoletti and Susan K. Comoletti (collectively, “Debtors”) requesting an award of sanctions against June E. Smith (“Smith”) and her counsel Frank A. Hamner (“Hamner”) (collectively, “Respondents”) pursuant to 11 U.S.C. Section 362(k). An expedited hearing was held on August 13, 2009 and a continued hearing was held on August 24, 2009 at which the Debtors, counsel for the Debtors, Smith, Hamner, and the Chapter 7 Trustee appeared.

The parties, pursuant to the Court’s directive, filed post-hearing briefs (Doc. Nos. 46, 49). The Motion is due to be granted in part for the reasons set forth herein. The Court makes the following findings and conclusions after reviewing the parties’ submissions, hearing live testimony and argument, and being otherwise fully advised in the premises.

***Introduction***

This matter arises from the issuance of a Writ of Bodily Attachment against Mr. Comoletti in a State Court contempt proceeding. The Debtors assert the Respondents willfully violated the automatic stay and request an award of attorneys’ fees and punitive

damages of \$50,000.00 pursuant to 11 U.S.C. Section 362(k). Respondents assert their actions are not within the ambit of the automatic stay.

The Court has had great difficulty in ascertaining the facts. The facts are convoluted. The Debtors' presentations to the Court were sparse. Their Schedules and Statement of Financial Affairs are inaccurate and incomplete. They did not identify who has an ownership interest in their mortuary business and what assets the business owns versus the assets they own individually. Two State Court proceedings instituted by Smith, a foreclosure action and a replevin action, are pending and intertwined. Neither party presented a comprehensible chronology of events or a complete record of the State Court pleadings. The Debtors assert they incurred attorney's fees as actual damages, but presented no evidence of attorney's fees incurred.

#### ***Foreclosure Proceeding and Bankruptcy***

The Debtors jointly, or Mr. Smith individually, own a funeral home business, Atlantic Mortuary Services, Inc. ("AMSI"), located at 117 Barton Avenue, Rockledge, Florida 32955 ("Premises"). Mr. Comoletti was employed full-time as the Director of AMSI and operated the business. The business is now closed or being operated by Smith. The Debtors, or Mr. Smith individually, purchased AMSI and its various tangible and intangible assets from Smith in 2006. Smith financed the sale and holds a first priority security interest in various assets of AMSI including the Premises pursuant to a Note and Mortgage. The Debtors could not explain whether they own AMSI's stock jointly or Mr. Comoletti owns it individually. They did not present the sale documents, the loan and mortgage instruments, or any corporate documents.

The Debtors defaulted on the Note and Mortgage and Smith instituted a Florida State Court foreclosure action in December 2008 against the Debtors individually and AMSI captioned *June E. Smith v. David Comoletti, individually, et al.*, Case No. 05-2008-CA-071760 (“Foreclosure Action”) (Debtors’ Exh. 4). Smith filed motions for default against the defendants in January 2009. The Clerk of Court entered defaults against Mrs. Comoletti and AMSI, but not Mr. Comoletti.

The Debtors had other financial problems, including a home mortgage default, and they sought the assistance of bankruptcy counsel. Bankruptcy counsel, as counsel for the Debtors and not AMSI, engaged in email communications with counsel for Smith on February 9 and February 10, 2009 (Debtors’ Exh. 1). Debtors’ counsel advised Smith’s counsel the Debtors would be filing a Chapter 7 bankruptcy case within the week.

The Debtors filed for bankruptcy protection on February 18, 2009 (“Petition Date”) and the automatic stay of 11 U.S.C. Section 362(a) immediately arose as to the Debtors. AMSI is not a debtor in bankruptcy and is not protected by the automatic stay. The Debtors listed Smith as a secured creditor in Schedule D and Hamner as her counsel. Notice of the Debtors’ bankruptcy case was issued to the Respondents by the Court on March 1, 2009 (Doc. No. 10).

The Debtors listed as assets owned by them jointly in Schedule B (Doc. No. 1): (i) the Premises valued at \$800,000.00; (ii) prepaid funerals in trust of \$12,000.00; (iii) furniture used by AMSI valued at \$600.00; (iv) a washer and dryer used by AMSI valued at \$75.00; (v) business supplies used by AMSI valued at \$300.00; (v) urns in stock used by AMSI valued at \$400.00; and (vi) three vehicles used by AMSI and valued at

\$4,500.00. They filed a Statement of Intention (Doc. No. 1) stating they intend to surrender the “business property” in which Smith has a security interest.

They listed “none” in Schedule B for stock and interests in businesses. They listed AMSI in Question 18 of their Statement of Financial Affairs, but failed to disclose any information regarding AMSI, including its officers, directors, and shareholders, in Questions 19 through 22 of their Statement of Financial Affairs. The Debtors’ Schedules and Statement of Financial Affairs are deficient. Their ownership interest in AMSI constitutes property of the estate pursuant to 11 U.S.C. Section 541(a). The business assets titled in the name of AMSI constitute property of AMSI and not property of the Debtors’ estate.

Smith has been actively involved in the Debtors’ bankruptcy case. She attended the Debtors’ meeting of creditors on March 26, 2009. She filed Claim No. 2-1 asserting a secured claim of \$750,000.00. She engaged experienced bankruptcy counsel who filed a Notice of Appearance on April 22, 2009. The Chapter 7 Trustee conducted a Rule 2004 examination of the Debtors at which Smith, her husband, and her bankruptcy counsel appeared.

***Post-Petition Events – Foreclosure Action***

The Debtors’ counsel and Smith’s counsel engaged in on-going communications post-petition, mainly by email. They had heated communications regarding AMSI’s telephone number (Debtors’ Exh. 5). The emails do not elucidate whether the telephone number dispute involved the Debtors in their individual capacities or in a corporate capacity.

Smith proceeded with the Foreclosure Action. She, through Hamner, filed and served on Mr. Comoletti on or about March 27, 2009 an Amended Notice of Hearing noticing a hearing on “Plaintiff’s Final Judgment of Foreclosure and Plaintiff’s Motion for Default *against David Comoletti*” for May 18, 2009 at 8:30 a.m. (Debtors’ Exhs. 4, 8) (*emphasis added*). Bankruptcy Counsel sent a Suggestion of Bankruptcy and a letter to Hamner on April 8, 2009 advising him the Motion for Default constituted a violation of the automatic stay and requesting he immediately withdraw the pleading (Debtors’ Exh. 9). Hamner sent a vitriolic response to Debtors’ counsel (Debtor’s Exh. 10) and did not withdraw the Motion for Default.

The Debtors filed a Motion for Sanctions on April 16, 2009 (Doc. No. 15) against Smith and Hamner requesting sanctions be imposed against them for pursuing the Motion for Default against Mr. Comoletti in violation of the stay. Smith and Hamner did not withdraw the Motion for Default or cancel the May 18, 2009 hearing set by them in the Foreclosure Action. The Debtors filed an Amended Motion for Sanctions on May 12, 2009 (Doc. No. 24) against Smith and Hamner and an emergency hearing was held on May 12, 2009.

Smith, through Hamner, on May 15, 2009—more than one month after the letter exchange between Debtors’ counsel and Hamner, and three days prior to the scheduled State Court hearing—filed a “Notice of Cancellation of Hearing (as to Motion for Default Only)” cancelling the hearing scheduled for May 18, 2009 on the Motion for Default (Debtors’ Exhs. 4, 11). The State Court cancelled the hearing on the Motion for Default. Hamner requested the Debtors withdraw their sanctions motions (Debtors’ Exh. 12). The

Debtors withdrew the Motion for Sanctions and Amended Motion for Sanctions (Doc. No. 29).

Smith proceeded with her motion for a final foreclosure judgment and obtained a Final Judgment of Foreclosure on May 18, 2009 ordering the Premises to be sold at public auction and appointing her as the Receiver for AMSI. The Debtors did not object to the entry of the Final Judgment of Foreclosure. She, as Receiver, was authorized to “[t]ake immediate possession of all property, assets and estates of every kind of [AMSI] . . . .” (Claim No. 2-1, ¶11). The Final Judgment directed:

[AMSI] and all of their directors, officers, agents, employees, attorneys, attorneys-in-fact, shareholders, and other persons who are in custody, possession, or control of any assets, books, records, or other property of [AMSI] shall deliver forthwith upon demand such property, monies, books and records to the Receiver, and shall forthwith grant to the Receiver authorization to be a signatory as to all accounts at banks, brokerage firms or financial institutions which have possession, custody or control of any assets or funds in the name of or for the benefit of AMSI;

. . . .

[AMSI] and their principals, and respective officers, agents, employees, attorneys, and attorneys-in-fact shall take no action, directly or indirectly, to hinder, obstruct, or otherwise interfere with the Receiver in the conduct of the Receiver’s duties or to interfere in any manner, directly or indirectly, with the custody, possession, management, or control by the Receiver of the funds, assets, premises, and chores in action described above;

Title to all property, real estate or personal, all contracts, rights of action and all books and records of [AMSI] is vested by operation of law in the Receiver.

Id. at ¶¶6.a., 6.c., 6.d. No portion of the Final Judgment of Foreclosure is directed to or grants relief against the Debtors individually.

A foreclosure sale was held on July 29, 2009 and Smith purchased the Premises for \$100.00 (Debtors' Ex. 4). A Certificate of Title was issued to Smith by the State Court on August 11, 2009 (Debtors' Ex. 4). The Debtors did not oppose the foreclosure sale.

***Post-Petition Events – Replevin Action***

Smith, while the Foreclosure Action was pending, instituted a replevin action against AMSI in the State Court on March 3, 2009 captioned *June E. Smith v. Atlantic Mortuary*, Case No. 05-2009-CA-006944 (“Replevin Action”). Smith filed a series of motions seeking to recover property in which she asserts a security interest and a series of orders were entered by the State Court. The parties did not present the motions and orders to the Court, with the exception of the July 7, 2009 Order, and the Court is unable to determine whether any of the motions and/or orders were directed to the Debtors in their individual capacities. The Debtors concede in their pleadings the motions and orders were directed to Mr. Comoletti in his corporate capacity and not his individual capacity.

The State Court docket reflects a Prejudgment Writ of Replevin was entered by the State Court on March 13, 2009 and served on March 27, 2009. Smith, her counsel, and the Brevard County Sheriff appeared at the Premises and the Debtors' home and seized AMSI's assets. The Debtors did not challenge the replevin because they do not dispute Smith holds a security interest in the seized assets and they were not going to operate the business (Doc. No. 46, pp. 5-6).

Smith contends certain AMSI assets were missing and filed a Motion for Order to Show Cause in the Replevin Action. The State Court held a hearing on July 1, 2009 and an Order on Plaintiff's Motion for Order to Show Cause was entered on July 7, 2009 (Debtors' Exh. 13). The July 7, 2009 Show Cause Order directed AMSI to deliver certain property to Smith by July 17, 2009 and, in the event AMSI failed to comply, "Atlantic's representative" shall appear at a show cause hearing (Id.).

AMSI did not comply. An Order for Contempt and a Writ of Bodily Attachment was issued against Mr. Comoletti on July 31, 2009. He was arrested on August 13, 2009. The Debtors filed their Second Motion for Sanctions asserting the contempt proceedings violated the automatic stay and an emergency hearing was held telephonically on August 13, 2009. Hamner faxed to the State Court a motion to vacate the writ of bodily attachment and the State Court entered an Order granting the motion. Mr. Comoletti was released during the evening of August 13, 2009. Mr. Comoletti executed an affidavit setting forth the whereabouts of the missing assets (Debtors' Exh. 15).

#### *Automatic Stay*

The Debtors have the burden to establish Respondents violated the automatic stay and their violation was willful. Hardy v. I.R.S. (In re Hardy), 97 F.3d 1384, 1390 (11th Cir. 1996). The automatic stay of 11 U.S.C. Section 362(a) arose on the Petition Date by operation of law enjoining all entities from:

- (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

...

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

...

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.

11 U.S.C. § 362(a)(1), 362(a)(6). Property of the estate is defined to include “all legal or equitable interests of the debtor in property as of the commencement of the case.” 11 U.S.C. § 541(a)(1). Respondents have not sought stay relief. The automatic stay of Section 362(a) continues to be in full force and effect.

Section 362(k)(1) of the Bankruptcy Code provides for the imposition of sanctions where a stay violation is willful:

[A]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys’ fees, and, in appropriate circumstances, may recover punitive damages.

11 U.S.C. § 362(k)(1).<sup>1</sup> A “willful violation” of the automatic stay occurs when the creditor “(1) knew the automatic stay was invoked and (2) intended the actions which violated the stay.” Sanctions are appropriate pursuant to the Court’s inherent powers where the stay violator acted in bad faith. Glatter v. Mroz (In re Mroz), 65 F.3d 1567, 1576 (11th Cir. 1995). Sanctions are warranted where a continuing violation of the automatic stay occurs after the creditor received notice of the bankruptcy case. Matter of Maas, 69 B.R. 245, 247 (Bankr. M.D. Fla. 1986). The failure to remedy or undo a stay violation after receiving notice of a bankruptcy case constitutes a willful violation. Id.

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<sup>1</sup> Subsection (2) of 11 U.S.C. 362(k) is not applicable to this matter.

### *Analysis – Foreclosure Action*

Respondents had notice of the Debtors' bankruptcy case from its onset. Hamner engaged in on-going communications with Debtors' bankruptcy counsel throughout the bankruptcy case. Respondent is represented by experienced bankruptcy counsel in this case. Smith and Hamner knew the automatic stay arose on the Petition Date and is in full force and effect.

Respondents, despite this knowledge, continued to pursue a default against Mr. Comoletti individually post-petition in the Foreclosure Action. The Motion for Default and Amended Notice of Hearing were directed against Mr. Comoletti individually. Respondents' continued pursuit of a default against Mr. Comoletti was in violation of the automatic stay. 11 U.S.C. §§ 362(a)(1), 362(a)(6). They did not withdraw the Motion for Default and only cancelled the hearing on the Motion for Default after the Debtors filed two motions for sanctions and a hearing had been conducted by this Court. Their failure to withdraw the Motion for Default constitutes an on-going violation of the automatic stay.

Respondents knew the automatic stay was invoked and intended the actions which violated the stay. They knowingly and intentionally violated the automatic stay and are in contempt of Court with respect to the default proceedings in the Foreclosure Action. Jove Eng'g, Inc. v. I.R.S. (In re Jove), 92 F.3d 1539,1555; Maas, 69 B.R. at 247. Their actions are void and without effect. Borg-Warner Acceptance Corp. v. Hall, 685 F.2d 1306, 1308 (11th Cir. 1982).

Section 362(k) provides for an award of actual damages incurred by a debtor as the result of a willful stay violation. The Courts have uniformly held a debtor seeking an award of sanctions must establish she suffered actual damages as a result of the stay violation. In re Hutchings, 348 B.R. 847, 897-901 (Bankr. N.D. Ala. 2006) (providing a comprehensive overview of cases requiring debtor to establish actual damages). “[A]bsent proof of injury, a technical violation of the stay, no matter how willful, is not enough to support an award of damages.” In re Palumbo Family Ltd. P’ship, 182 B.R. 447, 471 (Bankr. E.D. Va. 1995).

The Debtors assert in their pleadings they have incurred attorney’s fees as actual damages as a direct result of Respondents’ willful stay violations. They presented no evidence of attorney’s fees or costs incurred. They are not entitled to an award of attorney’s fees or costs.

Mr. Comoletti has suffered emotional distress, aggravation, and inconvenience, which injuries are readily apparent. The circumstances surrounding Respondents’ stay violation make it obvious a reasonable person would suffer emotional harm. Dawson v. Washington Mut. Bank, F.A. (In re Dawson), 390 F.3d 1139, 1151 (9th Cir. 2004). He is entitled to an actual damages award of \$250.00. The Debtors did not establish they suffered any other actual damages.

Section 362(k) provides for an award of punitive damages in appropriate circumstances. Respondents’ actions warrant the imposition of sanctions commensurate with the degree of their stay violation. They willfully violated the automatic stay in the Foreclosure Action by pursuing a default against Mr. Comoletti and refusing to withdraw

the matter from the State Court docket. Hamner acted cavalierly with total disregard of the automatic stay and without consulting Smith's bankruptcy counsel.

Respondents' actions were more than mere technical violations of the automatic stay, but were not grossly egregious. Respondents had difficulty in ascertaining who had an interest in AMSI's assets and the location of the assets. The Debtors were uncooperative. Respondents attempted to resolve those issues in State Court. The better course of action for Respondents would have been to bring those issues before this Court and request relief from the automatic stay pursuant to 11 U.S.C. Section 362(d).

Respondents were aware of the automatic stay and acted imprudently. Sanctions of \$500.00 are due to be imposed against Respondents, jointly and severally, pursuant to 11 U.S.C. Section 362(k), 11 U.S.C. Section 105(a), and the Court's inherent powers.

#### ***Analysis – Replevin Action***

The Debtors did not establish Respondents committed any stay violations with respect to the Replevin Action. The plain and unambiguous language of 11 U.S.C. Section 362(a) prevents a creditor from taking any action against "the debtor" or "property of the estate." 11 U.S.C. §§ 362(a)(1), (a)(3), (a)(6). The Debtors did not establish Respondents took any action against Mr. Comoletti individually or against property of the Debtors' estate with respect to the Replevin Action. They presented no Replevin Action pleadings or orders directed to or against Mr. Comoletti individually. The July 7, 2009 Show Cause Order was directed to AMSI and its representative. AMSI

failed to comply with the Show Cause Order and the Writ of Bodily Attachment was issued against Mr. Comoletti in his capacity as an officer of AMSI.<sup>2</sup>

Respondents did not replevin any items constituting property of the Debtors' bankruptcy estate. Mr. Comoletti admitted at his Rule 2004 examination the assets listed in Schedule B relating to AMSI are property of AMSI and not the Debtors (Debtors' Exh. 18). Listing the assets of AMSI in Schedule B misrepresents their ownership and does not bring them within the protection of 11 U.S.C. Section 362(a). The Debtors' ownership interest in AMSI constitutes property of the estate pursuant to 11 U.S.C. Section 541(a) and Respondents took no action against their stock interest.

Accordingly, it is

**ORDERED, ADJUDGED and DECREED** that the Debtors' Emergency Second Motion for Sanctions (Doc. No. 39) is hereby **GRANTED**; and it is

**ORDERED, ADJUDGED and DECREED** that Respondents willfully violated the automatic stay of 11 U.S.C. Section 362(a) and actual damages of \$250.00 and sanctions of \$500.00 are hereby awarded to the Debtors and against Respondents, jointly and severally, pursuant to 11 U.S.C. Sections 105(a) and 362(k) and the Court's inherent powers; and it is further

**ORDERED, ADJUDGED and DECREED** that the Motion for Default and any and all other actions taken by Respondents post-petition against Mr. Comoletti individually in the Replevin Action are **VOID AND OF NO EFFECT** and Respondents

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<sup>2</sup> Mr. Comoletti testified Smith's husband contacted Mr. Comoletti's Cub Scout leader and minister and advised them of Mr. Comoletti's arrest, apparently with the intent to damage Mr. Comoletti's reputation. Mr. Comoletti did not establish such communications occurred. If such communications were made, they may constitute violations of the automatic stay.

are directed to forthwith take all steps necessary to withdraw and vacate all such actions;  
and it is further

**ORDERED, ADJUDGED and DECREED** that the Court retains jurisdiction to enforce the provisions of this Order and to assess whether the imposition of additional sanctions may be appropriate.

A separate Judgment consistent with these findings and rulings shall be entered contemporaneously.

Dated this 18th day of November, 2009.

/s/ Arthur B. Briskman  
ARTHUR B. BRISKMAN  
United States Bankruptcy Judge